Hock Thai Finance Corp Bhd v Tai Choi Yu

HIGH COURT (MIRI) — ORIGINATING SUMMONS NO 24-98 OF 1997
HASAN LAH JC
22 DECEMBER 1999

Civil Procedure *— Affidavits — affidavit in support of application — Filing and service of — Affidavit not served within 14 days — Applicability of O 32 r 13(2)(b) Rules of the High Court 1980*

The plaintiff obtained judgment against the defendant and the defendant applied for a stay of execution and filed an affidavit dated 7 July 1999. The plaintiff filed an affidavit in reply dated 30 July 1999. The defendant's application was fixed for hearing on 1 December 1999. On 30 November 1999 the defendant affirmed an affidavit and filed it the next day. The plaintiff objected to the affidavit and contended that it contravened O 32 r 13(2)(b) of the Rules of the High Court 1980 ('the RHC') as it had been filed more than 14 days after the plaintiff's affidavit was served on the defendant. The defendant argued that the RHC did not cover affidavits in support but were limited to affidavits in reply to other affidavits. The defendant claimed his affidavit stood alone and was not a reply to the plaintiff's affidavit.

Held, allowing the preliminary objection and disallowing the affidavit:

(1) If the view that O 32 r 13(2)(b) of the RHC is only applicable to the affidavit in reply to the affidavit in support of the application is correct then O 32 r 13(2)(b) of the RHC would not serve its purpose because the parties are allowed to file the subsequent affidavits at the last minute which invariably would lead to adjournment of the hearing as the other party might want to reply to the said affidavit. It is common knowledge that in most of the applications further affidavits subsequent to affidavit filed in reply to affidavit in support of the application are being filed by the parties. If this is allowed to go on unnecessary delay in the disposal of the cases concerned would result and therefore the object of having O 32 r 13(2)(b) of the RHC has not been attained. The court agrees with the view that O 32 r 13(2)(b) of the RHC is also applicable to subsequent affidavits; *KS Chua & Co v Chui Miang Chew & Ors* [1995] 4 MLJ 436, *Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa* [1997] 1 MLJ 453 followed (see pp 457I–458B).

(2) The words used in O 32 r 13(2)(b) of the RHC are 'a party wishing to reply an affidavit served on him' and 'the affidavit he intends to reply was served on him'. It does not say 'affidavit in support of an application' but it just states 'affidavit'. Such wordings do not support the view that O 32 r 13(2)(b) of the RHC is only applicable to affidavit in reply to the affidavit in support of the application (see p 458D–E).

A **[Bahasa Malaysia summary**

Plaintif memperolehi penghakiman terhadap defendan dan defendan memohon untuk penggantungan perlaksanaan dan memfailkan satu afidavit bertarikh 7 Julai 1999. Plaintif memfailkan satu afidavit jawapan bertarikh 30 Julai 1999. Permohonan defendan telah
B ditetapkan untuk perbicaraan pada 1 Disember 1999. Pada 30 November 1999 defendan telah mengikrarkan satu afidavit dan memfailkannya pada hari yang berikutnya. Plaintif telah membantah kepada afidavit tersebut dan dan menegaskan bahawa ianya melanggari A 32 k 13(2)(b) Kaedah-Kaedah Mahkamah Tinggi 1980 ('Kaedah-Kaedah tersebut') kerana ianya telah difailkan lebih
C daripada 14 hari selepas afidavit plaintif disampaikan ke atas defendan. Defendan berhujah bahawa Kaedah-Kaedah tersebut tidak meliputi afidavit-afidavit sokongan tetapi telah dihadkan pada afidavit-afidavit bagi menjawab afidavit-afidavit lain. Defendan menuntut bahawa afidavitnya bersendirian dan bukannya satu
D jawapan kepada afidavit plaintif.

Diputuskan, membenarkan bantahan awal dan dan menolak afidavit:

(1) Sekiranya adalah pandngan bahawa A 32 k 13(2)(b) KMT hanya terpakai kepada afidavit jawapan terhadap afidavit sokongan
E permohonan adalah betul maka A 32 k 13(2)(b) KMT tidak mencapai tujuannya kerana pihak-pihak dibenarkan untuk memfailkan afidavit-afidavit berikutnya pada saat terakhir yang secara tak langsung akan menyebabkan tangguhan perbicaraan kerana pihak yang satu lagi mungkin ingin menjawab kepada afidavit tersebut. Adalah pengetahuan umum bahawa di dalam
F kebanyakan permohonan terdapat afidavit-afidavit berikutnya daripada afidavit yang difailkan sebagai jawapan kepada afidavit sokongan permohonan yang akan difailkan oleh pihak-pihak tersebut. Sekiranya ini dibenarkan berterusan kelewatan yang tidak sepatutnya akan berlaku dalam menyelesaikan kes-kes
G berkaitan dan oleh itu tujuan A 32 k 13(2)(b) KMT tidak akan tercapai. Mahkamah bersetuju dengan pandangan bahawa A 32 k 13(2)(b) KMT juga terpakai terhadap afidavit-afidavit berikutnya; *KS Chua & Co v Chui Miang Chew & Ors* [1995] 4 MLJ 436, *Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa* [1997] 1 MLJ 453 diikut (lihat ms 457I–458B).

H (2) Perkataan-perkataan yang digunakan dalam A 32 k 13(2)(b) KMT adalah 'satu pihak yang ingin menjawab satu afidavit yang disampaikan ke atas beliau' dan 'afidavit yang beliau bermaksud untuk menjawab telah disampaikan ke atas beliau'. Ia tidak menyatakan 'afidavit jawapan satu permohonan' tetapi ia hanya menyatakan 'afidavit'. Perkataan-perkataan sedemikian tidak
I menyokong pandangan bahawa A 32 k 13(2)(b) KMT hanya terpakai untuk afidavit jawapan terhadap afidavit sokongan permohonan tersebut (lihat ms 458D–E).]

Notes

For cases on affidavits generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 219–293.

Cases referred to

KS Chua & Co v Chui Miang Chew & Ors [1995] 4 MLJ 436 (folld)

Majlis Daerah Dungun v Tenaga Nasional Bhd [1998] 1 AMR 516 (refd)

Natseven TV Sdn Bhd v Television New Zealand Ltd (unreported) High Court, Kuching Suit No 22–179–98–II (refd)

Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa [1997] 1 MLJ 453 (folld)

Legislation referred to

Rules of the High Court 1980 O 32 r 13(2)(b)

Kevin Kong (*M/s Khoo & Co*) for the plaintiff.
Tai Choi Yu (*M/s Tahi Choi Yu & Co*) for the defendant.

Hasan JC: By summons in chambers dated 8 July 1999 (encl 45) the defendant is applying for a stay of execution of the judgment pending the final disposal of the defendant's appeal to the Court of Appeal. In support of that application the defendant filed two affidavits — the affidavit in support affirmed on 7 July 1999 by Mr Tai Choi Yu and the affidavit in support (11) affirmed by Mr Tai Choi Yu on 30 November 1999 which was filed on 1 December 1999. The plaintiff filed an affidavit in reply affirmed by Wong Lee Chin on 30 July 1999 which was filed on 31 July 1999.

The application was fixed for hearing on 1 December 1999. At the outset of the hearing of the application the learned counsel for the plaintiff objected to the use of the defendant's affidavit in support (11) on the ground that it was not filed within 14 days after the service of the plaintiff's affidavit in reply which is in contravention of O 32 r 13(2)(b) of the Rules of the High Court 1980 ('the RHC').

In response to that the learned counsel for the defendant submitted that O 32 r 13(2)(b) of the RHC has no application to the defendant's affidavit in support (11). According to the learned counsel O 32 r 13(2)(b) of the RHC is only applicable to an affidavit in reply to the affidavit in support of an application but it does not apply to a subsequent affidavit.

At the moment there are two lines of authorities on the interpretation of the provision of O 32 r 13(2)(b) of RHC.

In *KS Chua & Co v Chui Miang Chew & Ors* [1995] 4 MLJ 436 Abdul Malik Ishak J opted for the wider interpretation of O 32 r 13(2)(b) of the RHC, viz that it applies to subsequent affidavits. At pp 442 and 443 of the report the learned judge opined:

> Now, reverting back to O 32 r 13(2)(b) of the RHC which came by way of an amendment vide PU(A) 193/93 where it imposes on a party wishing to reply

A to an affidavit served on him, a mandatory obligation to file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him unless provided by the rules. This onerous obligation is also placed on the applicant who files affidavit in support of his application to file and serve on the other party within 14 days from the date of the filing of the said application (see O 32 r 13(2)(a) of the RHC). Thus, under this new O 32 r 13(2) of the RHC a strict time table has been set by the Rules Committee and my impression of it is that it is draconian as it does not give much room space to manoeuvre for the applicant to file a further affidavit in support of his application after 14 days from the date of filing of the application. In the event the respondent files an affidavit in reply which alleges a certain fact detrimental to the applicant, the applicant must reply otherwise those facts not replied will be deemed to be accepted by the applicant (*Alloy Automobile Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332; and *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287) and this must surely be the dilemma which the applicant must go through. The strict requirement under this rule will simply mean that the courts are not obliged and indeed are precluded from considering any affidavits filed out of the 14-day period unless applications to file those affidavits out of time formally have been made and granted by the courts. In my judgment, the plaintiffs here have breached the strict requirements of O 32 r 13(2)(b) of the RHC. Bereft of any formal application to file those affidavits in encls 45, 48, 43 and 44 out of time, I have no choice but to ignore those affidavits.

In *Majlis Daerah Dungun v Tenaga Nasional Berhad* [1998] 1 AMR 516 Mohd Noor b Hj Ahmad J was of the view that O 32 r 13(2) of the RHC applies only to an affidavit filed in support of an application in chambers and to an affidavit in reply to the affidavit in support of such application, but not a subsequent affidavit.

In the recent case of *Natseven TV Sdn Bhd v Television New Zealand Ltd* (High Court at Kuching Suit No 22–179–98-II) (unreported) Muhammad Kamil bin Awang J agreed with the said decision where the learned judge said:

> Applying the golden rule of construction, sub-r 2 of r 13, does not apply to a subsequent affidavit as the 14 days rule expressly states that it is applicable to two types of affidavit; namely, an affidavit in support of the application, and an affidavit in reply thereto.

The rationale for the introduction of O 32 r 13(2) of the RHC has been clearly stated by Mahadev Shanker JCA in *Pemunya Kapal MV Brihope & Ors v Emmanuel E Okwuosa* [1997] 1 MLJ 453 at p 470 that:

> Order 32 r 13(2) of RHC was specially enacted to eradicate the rampant abuse of process by malevolent, indolent or unpaid practitioners who had devised a fail-safe method of causing unwarranted delays by filing affidavits at the last minute. The rule is mandatory.

It is my view that if the view that O 32 r 13(2)(b) of the RHC is only applicable to the affidavit in reply to the affidavit in support of the application is correct then O 32 r 13(2)(b) of the RHC would not serve its

purpose because the parties are allowed to file the subsequent affidavits at the last minute which invariably would lead to adjournment of the hearing as the other party might want to reply to the said affidavit. It is common knowledge that in most of the applications further affidavits subsequent to affidavit filed in reply to affidavit in support of the application are being filed by the parties. If this is allowed to go on unnecessary delay in the disposal of the cases concerned would result and therefore the object of having O 32 r 13(2)(b) of the RHC has not been attained. In the circumstances I agreed with the view that O 32 r 13(2)(b) of the RHC is also applicable to subsequent affidavits.

For ease of reference I reproduce O 32 r 13(2) of the RHC. It states:

> Save as otherwise provided in these rules —
>
> (a) an affidavit intended to be used in support of an application must be filed and served on the other party within 14 days from the date of the filing of the application; and
>
> (b) a party wishing to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

It is to be observed that the words used in para (b) are 'a party wishing to reply an affidavit served on him' and 'the affidavit he intends to reply was served on him'. It does not say 'affidavit in support of an application' but it just states 'affidavit'. In my view such wordings do not support the view that O 32 r 13(2)(b) of the RHC is only applicable to affidavit in reply to the affidavit in support of the application.

For the aforesaid reasons I ruled that O 32 r 13(2)(b) of the RHC is applicable to the defendant's affidavit in support (11). As the said affidavit was filed in contravention of O 32 r 13(2)(b) of the RHC, I further ruled that it could not be used for the purpose of the application (encl 45).

Preliminary objection allowed, affidavit disallowed.

Reported by Andrew Christopher Simon